YUSRI PIALMI

v.

PP

FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
ZULKEFLI MAKINUDIN FCJ
ABDULL HAMID EMBONG FCJ
[CRIMINAL APPEAL NO: 05-165-2009 (J)]
14 JUNE 2010

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Appeal against conviction and sentence - Discrepancy - Nett weight of cannabis as determined by chemist exceeded gross weight of cannabis when it was first recovered by police - Whether created reasonable doubt*

EVIDENCE: *Adverse inference - Witnesses - Failure to call other members of police raiding party - Whether there was withholding or suppression of evidence - Whether court should invoke s. 114(g) Evidence Act 1950*

The appellant was convicted by the High Court for the offence of trafficking in 1850.21 gm of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and sentenced to death under s. 39B(2) of the Act. The appellant appealed to the Court of Appeal against the decision of the High Court which was dismissed. Hence, the appellant appealed to this court against the decision of the Court of Appeal in affirming his conviction and sentence by the High Court. The appellant advanced two grounds of appeal (i) the prosecution had relied exclusively on the evidence of SP2 to prove that the appellant was in possession of the drugs but took no further steps to call other members of the police raiding party nor offered them to the defence as witnesses and asked the court to invoke s. 114(g) of the Evidence Act 1950; (ii) there was a doubt as to the identity of the cannabis in view of the failure of the prosecution to explain the discrepancy as to the increase in the weight of the cannabis arising from the evidence of the investigating officer (SP4) and the chemist (SP6) and as such it could not be said that the prosecution had proved the offence of trafficking beyond reasonable doubt.

A **Held (allowing the appeal; setting aside conviction and sentence; acquitting and discharging the accused)**
Per Zulkefli Makinudin FCJ delivering the judgment of the court:

(1) Even without the calling or offering as witnesses from amongst
B the other members of the police raiding party, the prosecution's case was complete with the evidence of SP2 whose evidence was credible and ought to be believed. SP2 was not an interested witness but a police officer performing his duties. There was no withholding or suppression of material evidence by the
C prosecution so as to invoke the application of s. 114(g) of the Evidence Act against the prosecution's case. In fact SP2's evidence had revealed the names of the other members of the police raiding party. There was no concealment whatsoever. There was no challenge by the defence on the evidence of SP2
D of any ulterior motive that he might have to concoct evidence against the appellant. Failure to cross-examine a witness on a crucial part of the case would amount to an acceptance of the witness' testimony. There was no merit in the arguments of the appellant on this ground. (paras 6 & 7)

E
(2) The appellant had shown there was a discrepancy in that the weight of the cannabis as determined by the chemist exceeded the weight of the cannabis when they were first recovered by the police. According to the chemist, the total weight of the
F cannabis contained in the two packages was 1850.21 grammes. However, the investigating officer in his evidence stated that he weighed the cannabis and found the total weight to be 1840 grammes. This in turn resulted in creating a doubt as to the identity of the cannabis. The prosecution could not be said to have proven the offence of trafficking beyond reasonable doubt
G against the appellant. A reasonable doubt had been created as to whether the cannabis that was recovered by the police that was sent to the chemist for analysis was the same substance that was found to be cannabis and it was in respect of that substance the appellant was charged with trafficking. A defect
H with regard to the identity of the case exhibit in the present case was a serious matter. On this ground alone the appellant would succeed in his appeal. (paras 2, 8 & 10)

I

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah disabit oleh Mahkamah Tinggi atas kesalahan mengedar 1850.21 gm cannabis di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') dan dihukum mati di bawah s. 39B(2) Akta tersebut. Perayu merayu ke Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi tetapi rayuan ditolak. Oleh itu, perayu merayu ke mahkamah ini terhadap keputusan Mahkamah Rayuan dalam mengesahkan sabitan dan hukuman yang dikenakan ke atasnya oleh Mahkamah Tinggi. Perayu telah membangkitkan dua alasan rayuan (i) pihak pendakwaan telah bergantung secara ekslusif atas keterangan SP2 untuk membuktikan bahawa perayu mempunyai milikan dadah tersebut tetapi tidak mengambil langkah selanjutnya untuk memanggil ahli-ahli lain dari pasukan anggota polis yang telah membuat serbuan dan tidak menawarkan mereka ke pihak pembelaan sebagai saksi-saksi dan memohon mahkamah menggunakan s. 114(g) Akta Keterangan 1950; (ii) terdapat keraguan mengenai identiti cannabis memandangkan kegagalan pihak pendakwaan untuk menerangkan kepincangan mengenai kenaikan berat cannabis yang berbangkit dari keterangan pegawai penyiasat (SP4) dan ahli kimia (SP6) dan oleh itu tidak boleh dikatakan bahawa pihak pendakwaan telah membuktikan kesalahan pengedaran melampaui keraguan yang munasabah.

Diputuskan (membenarkan rayuan; mengenepikan sabitan dan hukuman; membebaskan dan melepaskan tertuduh)
Oleh Zulkefli Makinudin HMP menyampaikan penghakiman mahkamah:

(1) Walaupun saksi-saksi tidak dipanggil atau ditawarkan dari ahli-ahli lain dari pasukan anggota polis yang telah membuat serbuan, kes pihak pendakwaan adalah cukup dengan keterangan SP2 yang boleh dipercayai dan patut dipercayai. SP2 bukanlah saksi berkepentingan tetapi seorang pegawai polis yang menjalankan tanggungjawabnya. Tidak terdapat penahanan atau penyekatan keterangan material oleh pihak pendakwaan untuk menggunakan pemakaian s. 114(g) Akta Keterangan 1950 terhadap kes pendakwaan. Secara fakta keterangan SP2 telah memberitahu nama-nama ahli-ahli lain dari pasukan anggota polis yang telah membuat serbuan. Tidak terdapat penyembunyian langsung. Tidak terdapat cabaran oleh pihak pembelaan atas keterangan SP2 mengenai apa-apa motif yang tidak baik sehingga SP2 terpaksa mereka-reka keterangan

terhadap perayu. Kegagalan memeriksa-balas seorang saksi mengenai bahagian penting kes boleh mengakibatkan penerimaan testimoni saksi. Tidak terdapat merit dalam hujahan-hujahan yang dibangkitkan oleh perayu atas alasan ini.

(2) Perayu telah menunjukkan terdapat kepincangan di dalam berat cannabis di mana berat yang diputuskan oleh ahli kimia telah melebihi berat cannabis apabila ia baru dijumpai oleh pihak polis. Menurut ahli kimia, berat keseluruhan cannabis yang didapati di dalam dua bungkusan adalah 1850.21 gram. Walaubagaimanapun, pegawai pengiasat di dalam keterangannya menyatakan bahawa beliau telah mengambil berat cannabis tersebut dan mendapati bahawa berat keseluruhan adalah 1840 gram. Ini telah mengakibatkan keraguan mengenai identiti cannabis. Pihak pendakwaraya tidak boleh dikatakan telah membuktikan kesalahan pengedaran melampaui keraguan yang munasabah terhadap perayu. Keraguan munasabah telah timbul sama ada cannabis telah dijumpai polis yang telah dihantar ke ahli kimia untuk analisa adalah bahan yang sama yang didapati sebagai cannabis dan ia adalah kerana bahan itulah perayu telah dituduh dengan kesalahan pengedaran. Kecacatan mengenai identiti kes eksibit di dalam kes ini adalah perkara yang serius. Atas alasan ini sahaja perayu boleh berjaya dalam rayuan ini.

Case(s) referred to:
PP v. Mohamed Ali [1962] 1 LNS 129 HC ***(refd)***
PP v. Teh Cheng Poh [1979] 1 LNS 82 HC ***(refd)***
Tan Yew Choy v. PP [2009] 4 CLJ 245 FC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***
Yeong Kia Heng lwn. PP [1992] 1 CLJ 364; [1992] 1 CLJ (Rep) 372 SC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 39B(1)(a), (2)
Evidence Act 1950, s. 114(g)

For the appellant - Shaik Saleem; M/s Shaik Adam & Co
For the prosecution - Suzana Atan DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Zulkefli Makinudin FCJ:

Introduction

[1] The appellant was convicted by the High Court for the offence of trafficking in 1850.21gm of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") and sentenced to death under s. 39B(2) of the Act. The appellant appealed to the Court of Appeal against the decision of the High Court. The appellant's appeal to the Court of Appeal was dismissed by majority (Low Hop Bing and Azhar bin Ma'ah, JJCA). Kang Hwee Gee, JCA dissented. The appellant now appeals to this court against the decision of the Court of Appeal in affirming his conviction and sentence by the High Court.

The Case For The Prosecution

[2] The relevant facts of the case for the prosecution are as follows:

On 25 February 2005, at about 4pm, the arresting officer (SP2) received information on drug trafficking activities along Jalan Besar, Taman Saujana, Johor Bahru, where a male Malay by the name of Yus would be involved, between 6 and 8pm. Acting on this information, SP2 and his police party proceeded by car to the target place at about 6.30pm. They arrived there at 7pm. SP2 remained in the car which was parked by the side of the road. He kept watch, while his men took their respective positions at designated places. Subsequently, SP2 spotted a male Malay who was identified as the appellant, coming out of a lane by the side of the road. The appellant was holding a plastic bag in his right hand. Apart from the appellant, no one else emerged from the road. SP2 and his men approached the appellant and detained him. When SP2 introduced himself as police, the appellant attempted to flee with his plastic bag in hand. SP2 stopped the appellant and thereafter a commotion ensued between the appellant and the police party. The appellant was then arrested by SP2 and his men. The plastic bag was found to contain two slabs of compressed dried leaves which, upon analysis by the Government chemist (SP6) was confirmed to be cannabis weighing 1850.21gm although SP4 said the weight of the cannabis was 1840 grammes. As will be seen this is a point in issue.

The Case For The Defence

[3] The relevant facts of the case for the defence are as follows:

According to the appellant at the time of arrest, the appellant was in a Kenari car with two other persons and not while walking as claimed by SP2. He had earlier walked out of the lane to the main road of Taman Saujana and was not carrying anything at the material time. As he was walking on the main road, a Kenari car with two persons in it stopped near him and asked where he was going. When he said he was going to the Giant Superstore the driver of the Kenari car asked him to get into the car and he got in and sat at the back seat. About 100 meters away, a motorcycle chased after the Kenari car and asked the driver to stop the car. Two men were on the motorcycle. When the Kenari car stopped, the two men opened the rear door and got into the car. They introduced themselves as police and handcuffed the appellant. The appellant was then brought to the police station. The police did not handcuff or bring the other two men in the car to the police station.

The Appeal

[4] Before this court the appellant advanced two grounds of appeal which can be discerned as follows:

(1) There is a doubt as to the identity of the cannabis in view of the failure of the prosecution to explain the discrepancy as to the increase in the weight of the cannabis arising from the evidence of the investigating officer (SP4) and the chemist (SP6) and as such it cannot be said that the prosecution has proved the offence of trafficking beyond reasonable doubt.

(2) The learned trial judge erred in law in his failure to invoke the application of the principle of adverse presumption under s. 114(g) of the Evidence Act 1950 against the prosecution's case.

[5] We shall first deal with the second ground of appeal. Learned counsel for the appellant submitted that it is the defence case that the drug was not found in the possession of the appellant. In this regard he contended that the prosecution had relied exclusively on the evidence of SP2 to prove that the appellant was in possession of the drugs but took no further steps to call other members of the

police raiding party nor offered them to the defence as witnesses. For this he asked the court to invoke s. 114(g) of the Evidence Act.

[6] With respect to the learned counsel for the appellant we do not agree with him. We are of the view even without the calling or offering as witnesses from amongst the other members of the police raiding party, the prosecution's case is complete with the evidence of SP2. The learned trial judge and the majority of the Court of Appeal had found SP2 to be a witness of truth. SP2 was not an interested witness, but a police officer performing his duties. He had related what he actually saw and did on that day. SP2's evidence is credible and ought to be believed. (See the cases of *PP v. Mohamed Ali* [1962] 1 LNS 129 and *PP v. Teh Cheng Poh* [1979] 1 LNS 82).

[7] We also find there is no withholding or suppression of material evidence by the prosecution so as to invoke the application of s. 114(g) of the Evidence Act against the prosecution's case. In fact SP2's evidence has revealed the names of the other members of the police raiding party. There was no concealment whatsoever. It is also to be noted that there is no challenge by the defence on the evidence of SP2 of any ulterior motive that he might have to concoct evidence against the appellant. On this point there is a principle of law which states that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness' testimony. (See the case of *Wong Swee Chin v. Public Prosecutor* [1980] 1 LNS 138). We therefore hold there is no merit in the arguments of learned counsel for the appellant on this ground.

[8] We shall now deal with the first ground of appeal. We find there is merit in the arguments advanced by learned counsel for the appellant. We agree with the contention of the appellant that there is a serious doubt as to the weight of the cannabis, thus affecting the identity of the cannabis. According to the chemist (SP6) the total weight of the cannabis contained in the two packages G1 and G2 is 1850.21 grammes. However, the investigating officer (SP4) in his evidence stated that he weighed the cannabis in the two packages G1 and G2 and found the total weight to be 1840 grammes. This would mean by the time the cannabis reached the hands of the chemist there had been an increase in the weight of that cannabis by 10.21 grammes. With regard to this discrepancy in

A the weight of the cannabis there was no explanation given by SP4 or any other witnesses called by the prosecution to justify the increase in the weight. There is no evidence adduced by the prosecution to show that the weighing scale used to weigh the cannabis has not been calibrated and therefore inaccurate. It is
B also to be noted that SP4 in his evidence did not explain the movement of the cannabis in packages G1 and G2 from the time he received and weighed them on 25 February 2005 until he placed them in a box marked "CL" (exh. P3) on 27 February 2005 and sent to the chemist on 28 February 2005. It is our
C judgment evaluating the prosecution's case in the light of the evidence available there exists a serious doubt as to the identity of the cannabis as a case exhibit. Was it the same item that was seized by SP2?

D **[9]** We have noted the learned trial judge's response to this discrepancy in the difference in the weight of the cannabis where he stated as follows:

> The discrepancy as to the difference in the weight of the drugs arising from the evidence of the investigating officer (SP4) and the
E chemist (SP6) is slight and is not fatal to the prosecution case. There is not the slightest doubt in my mind as to the identity of the drugs found and the drugs analysed and produced in Court - there is no break in the chain of exhibits. In any event the slight difference in the weight is still within section 39(1)(a) of the ADB.
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F [See page 47 of the Appeal Record Volume 2].

[10] With respect we could not agree with the above reasoning given by the learned trial judge. We are of the view if we were to accept the reasons given by the learned trial judge as representing
G the correct law, it means that the identity of the exhibit when it is first recovered is immaterial as ultimately what is important is the weight of the cannabis as determined by the chemist and that the weight is still within the minimum weight of 200 grammes to attract the statutory presumption of trafficking under s. 37(da) of
H the Act. In the present case, the appellant has shown there is a discrepancy in that the weight of the cannabis as determined by the chemist exceeded the weight of the cannabis when they were first recovered by the police. This in turn resulted in creating a doubt as to the identity of the cannabis, now the subject matter
I of the charge. It is trite that this is an element of the offence which the prosecution needs to prove. It will therefore follow that the

prosecution cannot be said to have proven the offence of trafficking beyond reasonable doubt against the appellant. A reasonable doubt has been created as to whether the cannabis that was recovered by the police that was sent to the chemist for analysis is the same substance that is found to be cannabis and it is in respect of that substance the appellant is charged with trafficking. This court had in fact earlier decided on this same issue in the case of *Tan Yew Choy v. PP* [2009] 4 CLJ 245 wherein it allowed the appeal of the appellant against conviction and sentence in respect of trafficking on the ground that there was a discrepancy, in that the nett weight as determined by the chemist exceeded the gross weight of the cannabis when it was first recovered by the police.

[11] We would like to categorically state here that the evidence adduced by the prosecution in the present case showed there is a reasonable defect in the identity of the case exhibit which is the subject matter of the prosecution against the appellant. In a criminal trial an accused person is permitted to take every available opportunity to reveal any defect in the prosecution's case. (See the case of *Yeong Kia Heng lwn. Pendakwa Raya* [1992] 1 CLJ 364; [1992] 1 CLJ (Rep) 372). A defect with regard to the identity of the case exhibit in the present case to us is a serious matter. On this ground alone the appellant would succeed in his appeal.

Conclusion

[12] For the reasons above stated we would allow this appeal. The conviction and sentence recorded by the learned trial judge in respect of the charge of trafficking against the appellant is hereby set aside. The appellant is accordingly acquitted and discharged.